

Faruque (Migration) [2024] AATA 3889 (20 September 2024)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Abdullah Al Faruque
VISA APPLICANT:	Ms Faiza Mahmuda
REPRESENTATIVE:	Mr Gareth John Lewis (MARN: 0319248)
CASE NUMBER:	2012547
HOME AFFAIRS REFERENCE(S):	BCC2017/4012729
MEMBER:	Meena Sripathy
DATE:	20 September 2024
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 309 (Spouse (Provisional)) visa: • cl. 309.211 and cl.309.221 of Schedule 2 to the Regulations; and • Public Interest Criterion 4020 for the purposes of cl 309.225 of Schedule 2 to the Regulations. •

Statement made on 20 September 2024 at 10:40am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – subclass 309 – applicant had submitted a bogus document – independent information about the marriage registration process – satisfied that the review applicant and visa applicant married as claimed – Marriage Certificate submitted is not a bogus document – applicant meets PIC 4020 – a child was born of the relationship – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5,65

Migration Regulations 1994, r 1.15, Schedule 2, cls 309.211, 309.221, 309.225

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 14 July 2020 to refuse to grant the applicant a Partner (Provisional) (Class UF) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
5. The applicant applied for the visa on 30 October 2017. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 309.225 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the delegate was not satisfied that PIC 4020(1) was met or that the requirements could be waived, for the purposes of cl. 309.225.
6. The review applicant appeared before the Tribunal on 19 September 2024 to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant. The Tribunal hearing was conducted with the assistance of an interpreter in the Bengali and English languages.
7. The review applicant was represented in relation to the review.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 309.225 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
10. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

11. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
12. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
13. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

14. Background

15. The visa applicant lodged the application for the visa under review, Partner (Provisional) Subclass 309/Partner (Migrant) Subclass 100 visa on 30 October 2017. She is sponsored by Abdullah Al Faruque, who is an Australian citizen and lodged a sponsorship form. The parties claim to have met on 21 April 2009 and married on 8 May 2011. A Nikah Nama document was submitted with the application to confirm the marriage and indicated it was registered on 29 January 2016.
16. Due to the significant gap between the date of marriage and date of registration, the file notes indicate the Nika Nama document was referred for verification. A further file note indicates on 27 August 2019, the outcome of the verification revealed that the document was non-genuine.¹
17. On 12 September 2019 the Department sent an invitation to the applicant to comment on this adverse information. She was informed about the requirements of PIC 4020 that requires there is no evidence that the applicant has given, or caused to be given, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa.
18. On 8 October 2019 the sponsor (review applicant) submitted a letter of explanation and apology. He stated that the Nikah Nama mistakenly stated 29 January 2016 instead of 8 May 2011 as the date of registration and this was an unexpected and inaccurate procedural mistake. He acknowledged that having provided the document, it was his responsibility, but sought to explain what happened. He attended the Marriage Registration office personally and was informed that at the time of preparation of the Nikah Nama for Registrar's signature the date written was by clerical error stated as 29 January 2016 instead of 8 May 2011 but this was not discovered at the time of signing. It was their household assistant who was

¹ BCC20174012729, ADD20124/5268761 – however the Tribunal notes the file note itself is somewhat ambiguous. It states *On 27/08/2019, an officer of the Department contacted the Noakhali municipality office and spoke to the Kazi/Qazi who verified the Nikahnama document provided with the document as non-genuine and could be found in their register.* (emphasis added)

dealing with the matter at the time, and they did not have enough knowledge of the matter. He submitted a correction letter from the Marriage Registry office. Also submitted with this explanation are various witness statements from friends and family who attended the wedding.

19. On 14 July 2020 the delegate refused the application, on the basis of finding that the applicant had submitted a bogus document. The delegate considered but was not satisfied the explanation was reasonable given that the same registration date (29 January 2016) has been consistently entered in all relevant fields of both the marriage certificate and the Nikah Nama. The delegate also concluded that there were no circumstances to waive the requirements of PIC 4020 on the material before the Department.

Evidence before the Tribunal

20. The sponsor applied for review to the AAT on 6 August 2020.
21. On 13 September 2024 the Tribunal received the following documents from the review applicant in support of the review:
 - Submission from the applicant's representative
 - Copy of visa applicant's Bangladesh passport
 - Australian passport and citizenship certificate for Shafa Mahra, child of the applicant and visa applicant born in 2023
 - Psychological report by Billel Rababi dated 16 August 2024 relating to the applicant
 - Screenshots of video calls between the applicants, call log history and WhatsApp chat
 - Photographs of the couple
 - Applicant's flight itinerary for travel Sydney to Dhaka 9-17 September 2024
 - Statement by the applicant dated 11 September 2024.

22. Tribunal hearing 19 September 2024

23. The Tribunal took evidence from the review applicant at hearing about his current living and work circumstances, the inception and development of his relationship and circumstances of the marriage in 2011 and of the relationship since then. He also gave evidence of the process undertaken to obtain the Nika Nama in 2016 and steps taken after he received the natural justice letter from the Department to clarify this issue. The Tribunal asked about the delay in lodging this application since his marriage and took evidence about time he has spent in Bangladesh.
24. The Tribunal also separately took oral evidence by video from the visa applicant, about the inception of the relationship and the marriage. The Tribunal asked about her current living arrangements and time spent with the review applicant in Bangladesh and birth of their child in 2023. Details of the evidence as relevant is set out in the discussion below.

25. The review and visa applicants gave their evidence in a straightforward and forthright manner and it found them to be honest and credible and accepts their oral evidence on that basis.
26. The review applicant handed up to the Tribunal at hearing a copy of the register book in which his marriage was registered, which he obtained during his recent visit to Bangladesh. A copy of this document is scanned to the Tribunal file.

27. Independent information

28. The *Muslim Marriages and Divorces (Registration) Act 1974*² is the Act that governs registration of Muslim marriages and divorces in Bangladesh. According to a 2022 study of the marriage registration system in Bangladesh conducted by Plan International, the law as set out in this legislation is brief and does not cover marriage registration requirements. This same report indicates that not all marriages are registered in Bangladesh and in respect of Muslim marriages, the *Muslim Marriages and Divorces (Registration) Act 1974* provides for retroactively registering a marriage by issue of Nikahnama³. The report provides the following description of the marriage registration process:

29. The process mapped below shows how a Nikah Registrar registers the marriage either immediately after the marriage is solemnised (by himself OR a religious leader), or at a time when the couple wants to register the marriage and/or needs a certificate/proof of marriage. Generally, a Nikah Nama is the most common proof of marriage issued for a Muslim marriage, but people can also apply for a marriage certificate. Demand for this document is low as it is only required when a couple travels overseas for use in visa applications⁴.

30. The process chart included in the above-mentioned report shows that the registration of the marriage, by completing the marriage volume book entry which is signed by the bride and bridegroom, is distinct from the proof of registration in the form of a Nikah Nama and Marriage Certificate. These documents are the ones that are less commonly requested in practice, and generally only when required for overseas travel.

31. FINDINGS AND REASONS

32. At hearing the review applicant gave evidence about the inception and development of the relationship. After his father passed away in 2007, as the youngest child in his family, his mother and brother began looking for a suitable girl for him to marry. His mother met the visa applicant's aunt through the family, and he met her and her family while visiting Bangladesh in 2009. She was not yet 18 years at that time. Over the next few years he maintained contact with her by phone and they decided to marry in 2011. He returned to Bangladesh in April 2011, and they married on 8 May 2011. The marriage was attended by members of his and the visa applicant's family, a religious official, Sofi Ullah and the Nikah Registrar Nurul Amin. He said it was registered at the time and recorded in the registration book. At hearing the review applicant handed up a copy of the extract of the register he took photos of while recently in Bangladesh. The interpreter assisted by sight translating the document and confirmed the references to 01/11(N) on the cover page, p43 and the signatures of Nurul Amin, Nikah Registrar, Sofi Ullah, Qazi and the review applicant as groom and visa applicant as bride on the document.

33. In her evidence the visa applicant gave broadly consistent evidence of the inception and development of the relationship. She was not sure about the attendance of the Nikah

²The Muslim Marriages and Divorces (Registration) Act, 1974 (minlaw.gov.bd)

³Plan International, Marriage Registration A Pathway to Protection and Empowerment Report 2022 [Marriage Registration_Bangladesh_Final.docx](#) (plan.org.au), p 22

⁴Ibid, p33

Registrar at the marriage itself, or other persons who solemnized the marriage. The review applicant subsequently clarified that the bride sits in a separate room and the registration book is brought to her for signature and that is why she would not know which officials are in attendance.

34. In 2016, in preparation of lodging the visa application the review applicant applied for a Nikah Nama and Certificate of Marriage and an error made in this document caused this problem. When he received the natural justice letter from the Department informing him the Nika Nama was not genuine, he was in Bangladesh, and he went to see the Qazi to understand what happened. He told the Tribunal the Qazi told him that no one sought verification from him and he denied saying the document was non genuine. He provided an Affidavit explaining the error in the earlier document was regarding the date of registration which should have correctly stated the date of marriage. This was provided to the Department in response.
35. The Tribunal has considered the review applicant's evidence at hearing, written explanation of how the Nikah Nama and Marriage Certificate documents were obtained, the Affidavit from the Qazi/Nikah Registrar and the copy of the original register record provided to the Tribunal at hearing. It has also considered the independent information referred to above relating to marriage registration processes in Bangladesh. On the basis of the favourable credibility assessment of the review applicant, and the evidence and documentation before it, the Tribunal makes the following findings. It finds the review and visa applicant had a marriage ceremony on 8 May 2011 solemnized by Sofi Ullah and at which the Nikah Registrar was also present. It finds the marriage was also registered on that same date, and recorded in the marriage volume book at Vol 01/11(N) of No 99/11(N) page 43. The Tribunal accepts that the review and visa applicants did not obtain a Marriage Certificate or Nikah Nama at that time. This is consistent with, and not unusual according to independent information considered by the Tribunal and cited above.
36. The Tribunal accepts that the review applicant obtained the Nikah Nama and Marriage Certificate in January 2016 in preparation for the Partner visa application and only for this purpose. It accepts that an error was made in the document provided to the Department by stating the date of requesting the document (29 January 2016) as the date of registration, when the correct date was the date of marriage, 8 May 2011. The Tribunal accepts this error has been acknowledged and clarified by the Qazi in his Affidavit of 22 September 2019.
37. The Tribunal has considered the information in the department file notes relating to the verification that was sought from the Noakhali municipality office. The review applicant told the Tribunal that the Qazi, Nurul Amin, denied any such verification was sought or given by him personally. The Tribunal notes the file note itself is ambiguous as to what was stated referring to it as *non-genuine and could be found in their register* – which appears to be contradictory information as to whether it was both “non genuine” and “found in their register”. There is no direct evidence of the actual communication with the Qazi, only a reference to an officer contacting the office and speaking with the person. The Affidavit since provided by the Kazi contradicts this information.
38. Having regard to all of the information and documentation bow before the Tribunal, and independent information about the marriage registration process, the Tribunal is satisfied that the review applicant and visa applicant married as claimed and registered their marriage as claimed on 8 May 2011. It accepts a typographical error was made in the Marriage Certificate submitted to the Department with the application, and this has since been clarified and corrected.
39. Having regard to the above findings, the Tribunal is satisfied that the Marriage Certificate submitted is not a bogus document as defined in s5(1) of the Act. Specifically, it is not a

document that purports to have been, but was not, issued in respect of the person; or is counterfeit or has been altered by a person who does not have authority to do so; or was obtained because of a false or misleading statement, whether or not made knowingly.

40. Therefore, the applicant meets PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

41. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
42. There is no information before the Tribunal that the applicant has been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. Therefore, PIC 4020(2) is met.

Has the applicant satisfied the identity requirements?

43. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. On the basis of numerous consistent identification documents submitted with the application including passport, birth certificate, ID card, and school records, and the absence of any issues or concerns as to identity, the Tribunal is satisfied as to the applicant's identity.
44. Therefore, the applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

45. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
46. There is no information before the Tribunal to indicate the applicant has been refused a visa in the relevant period because of a failure to satisfy PIC 4020(2A).
47. Therefore PIC 4020(2B) is met.
48. On the basis of the above, the applicant satisfies PIC 4020 for the purposes of cl 309.225.

49. Genuine and ongoing relationship 309.221

50. The Tribunal observes no decision was made in the delegate's decision record as to the genuineness of the spouse relationship at time of application and/or decision. Neither is there any indication any concerns were held about the genuineness of the relationship in the Department file records.
51. In the course of the review process and the substantial time that has passed since the refusal decision on 14 July 2020, the Tribunal notes review applicant has travelled to Bangladesh no fewer than 5 more times. He previously had resided in Bangladesh with the visa applicant for substantial periods since the marriage in May 2011, including for 11 months continuously in 2013 and 11 months in 2015 and periods of around 3 months in each

of 2017-2019 and the visa applicant had travelled to Australia in 2018 to visit him. The visa applicant gave evidence to the Tribunal that the review applicant has continued to financially support her throughout this period. A child was born of the relationship in June 2023, and the review applicant applied for, and obtained, Australian citizenship for her. The review and visa applicants each gave evidence to the Tribunal and indicated their intention to live together as spouses in Australia.

52. Having regard to the definition of spouse and married relationship in s5F and all the circumstances of the relationship required to be taken into consideration in r.1.15A(3), the Tribunal is satisfied, on the evidence before the Department and Tribunal of financial, household, social and nature of the commitment aspects of the relationship, that the parties have a mutual commitment to shared life to the exclusion of others; are in a genuine and continuing relationship. It accepts they are not living together at present because they are in separate countries, but they are not living separately and apart on a permanent basis. Therefore the applicant meets the requirements of s 5F(2)(b)-(d).
53. The Tribunal is satisfied the applicant meets cl.309.211 at time of application and cl.309.221 at time of decision.

DECISION

54. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 309 (Spouse (Provisional)) visa:
- cl. 309.211 and cl.309.221 of Schedule 2 to the Regulations; and
 - Public Interest Criterion 4020 for the purposes of cl 309.225 of Schedule 2 to the Regulations.
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Meena Sripathy
Senior Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...